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**IN THE  
COURT OF APPEALS OF INDIANA**

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RAYLON YOUNG,	)	
	)	
Appellant-Petitioner,	)	
	)	
vs.	)	No. 49A02-0708-PC-669
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Respondent.	)	

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APPEAL FROM THE MARION SUPERIOR COURT  
The Honorable Sheila A. Carlisle, Judge and  
The Honorable W.T. Robinette, Commissioner  
Cause No. 49G03-9511-PC-173081

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**March 26, 2008**

**MEMORANDUM DECISION - NOT FOR PUBLICATION**

**FRIEDLANDER, Judge**

Raylon Young appeals the denial of his petition for post-conviction relief, in which he claimed that appellate counsel was ineffective for failing to raise a sentencing issue on direct appeal. Young presents the following restated issue for review: Did Young receive ineffective assistance of appellate counsel?

We affirm.

The facts as reported in Young's second direct appeal are as follows:

On the night of November 19, 1995, Korey Roney went to Tajuan Johnson's home in Indianapolis, where Johnson and seven other people had gathered. Roney wrestled playfully with Marvin Graves in the front yard while the others watched. As Roney and Graves wrestled, Raylon Young's blue Oldsmobile Ninety-Eight pulled up to the house. Young, who was in the passenger seat, said, "what's up now," and lobbed the group with various well-known racial and sexual epithets. (R. at 236, 244-45, 316.) Young then pointed a gun at the crowd and fired at least two shots; one of these fatally struck Roney in the head.

After Young fired the shots, the car continued down the street, turned around, and came back towards the group. As the car passed the house a second time, Young fired several more shots while leaning out the passenger window and shooting across the hood of the car.

*Young v. State*, 761 N.E.2d 387, 388 (Ind. 2002). The State charged Young with murder. In 1996, a jury found Young guilty as charged, and the trial court sentenced Young to sixty-five years in the Indiana Department of Correction.

Young filed a direct appeal with the Indiana Supreme Court, arguing that the trial court erred in refusing Young's tendered instructions on lesser included offenses. *See Young v. State*, 699 N.E.2d 252 (Ind. 1998). In 1998, the Indiana Supreme Court held that the trial court committed reversible error when it refused to instruct the jury on reckless homicide, reversed Young's conviction, and remanded for a new trial. *Id.*

In 2000, a second jury trial was held. During closing argument, Young's lawyer conceded that Young killed Roney and that Young's behavior was reckless. *See Young v. State*, 761 N.E.2d 387. Therefore, the only serious dispute was whether Young acted knowingly (as alleged in the charging information) or merely recklessly. The jury again found Young guilty of murder.

At the sentencing hearing in December 2000, Young's trial counsel offered hardship to Young's three children as a mitigating circumstance, merely stating that Young would "miss seeing them grow up." *Petitioner's Exhibit 1* at 508. When sentencing Young, the trial court found three aggravating circumstances: (1) Young's prior criminal history, which included an adult misdemeanor conviction for possession of marijuana and juvenile adjudications for disorderly conduct as well as carrying a handgun without a license and battery based on an incident where he fired a gun several times at another person and struck him; (2) the nature and circumstances of the crime, including the fact that Young endangered the lives of several unarmed high school students when he shot at the group from his car on two separate occasions; and (3) prior attempts at rehabilitation had failed. The trial court stated that it chose to find no mitigating circumstances. After weighing the aggravators against the lack of mitigators, the trial court sentenced Young to sixty-five years in the Indiana Department of Correction.

In Young's second direct appeal to the Indiana Supreme Court, his counsel challenged the sufficiency of the evidence to support Young's murder conviction, specifically challenging the intent element. *Young v. State*, 761 N.E.2d 387. His counsel argued that the evidence did not support a knowing killing and supported only a reckless

homicide. *Id.* In 2002, our Supreme Court held the evidence was sufficient to support the knowing killing and affirmed his conviction for murder. *Id.*

In 2006, Young, by counsel, filed a petition for post-conviction relief, alleging that he had received ineffective assistance of appellate counsel because appellate counsel had failed to raise sentencing as an issue on direct appeal. Specifically, Young claimed appellate counsel was ineffective for failing to challenge the trial court's failure to find a hardship to dependents as a mitigating circumstance and for failing to argue that his sixty-five-year sentence was manifestly unreasonable. Young later filed an amended petition for post-conviction relief, adding a claim regarding newly discovered evidence.

The post-conviction court held evidentiary hearings in July 2006 and March 2007. During the first hearing, Young's appellate counsel testified that when preparing to file an appeal, he reviews the entire record to look for possible appellate arguments on instructions, sentencing, sufficiency of the evidence, issues specifically preserved for appeal, and possible fundamental error. Appellate counsel testified that he did not raise a sentencing argument in Young's appeal because he did not feel that it had any merit and that he instead chose to raise an argument challenging the sufficiency of Young's murder conviction because there was a legitimate issue with regard to intent. Appellate counsel noted that Young's enhanced sentence was supported by three aggravating circumstances and explained that he did not challenge the trial court's failure to find hardship to Young's dependents as a mitigating circumstance because the trial court was not obligated to grant it any mitigating weight.

In July 2007, the post-conviction court issued findings of fact and conclusions of law denying Young's petition for post-conviction relief. The post-conviction court concluded that Young's appellate counsel's decision not to raise a sentencing argument on appeal was a strategic decision and that Young was not denied the effective assistance of appellate counsel, explaining that:

Appellate counsel testified he did not raise this matter [the hardship to Young's dependents] on appeal as the three aggravating factors were so significant that this single, relatively minor, mitigator could not overcome them. In effect, Appellate counsel testified at the Evidentiary Hearing that this was a strategic decision. As noted above, such **strategic** decisions are accepted barring the most obvious of errors on the part of appellate counsel. Here, Appellate counsel's decision is beyond reproach. Petitioner's criminal history, and the non-elemental facts of this case were horrific. To suggest that there was **any** chance that the hardship to Petitioner's children would in any way balance those aggravators is simply wishful thinking. Clearly then, Appellate counsel was not ineffective for having failed to pursue such an obviously unavailing argument.

*Appellant's Appendix at 56-57(citation omitted) (emphasis in original).*<sup>1</sup>

On appeal, Young contends that the post-conviction court erred in denying his petition for post-conviction relief because he was denied the effective assistance of appellate counsel. Before addressing Young's claim of error, we note the general standard under which we review the denial of a petition for post-conviction relief. The petitioner in a post-conviction proceeding bears the burden of establishing grounds for relief by a preponderance of the evidence. *Fisher v. State*, 810 N.E.2d 674 (Ind. 2004); Ind. Post-Conviction Rule 1(5). When appealing from the denial of post-conviction

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<sup>1</sup> The post-conviction court also concluded that Young was not entitled to post-conviction relief based on his claim that he had newly discovered evidence because he failed to present any evidence supporting this claim. Young does not challenge this part of the post-conviction court's order.

relief, the petitioner stands in the position of one appealing from a negative judgment. *Fisher v. State*, 810 N.E.2d 674. On review, we will not reverse the judgment unless the evidence as a whole unerringly and unmistakably leads to a conclusion opposite that reached by the post-conviction court. *Id.*

We also note that the post-conviction court in this case entered findings of fact and conclusions thereon in accordance with Indiana Post-Conviction Rule 1(6). “A post-conviction court’s findings and judgment will be reversed only upon a showing of clear error—that which leaves us with a definite and firm conviction that a mistake has been made.” *Fisher v. State*, 810 N.E.2d at 679. In this review, we accept findings of fact unless clearly erroneous, but we accord no deference to conclusions of law. *Fisher v. State*, 810 N.E.2d 674. The post-conviction court is the sole judge of the weight of the evidence and the credibility of witnesses. *Id.*

Young argues his appellate counsel was ineffective for failing to challenge his sentence during his second direct appeal. Specifically, Young contends that appellate counsel was ineffective for failing to challenge the trial court’s failure to find a hardship to his dependents as a mitigating circumstance and for failing to argue that his sixty-five-year sentence was manifestly unreasonable.<sup>2</sup>

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<sup>2</sup> Young also asserts that the trial court “abused its discretion in failing to consider the fact that Young had no prior felony convictions as an adult[.]” *Appellant’s Brief* at 9. To the extent that Young is attempting to raise a free-standing challenge to his sentence on post-conviction, he cannot do so. See *Ben-Yisrayl v. State*, 738 N.E.2d 253 (Ind. 2000) (explaining that issues that were known and available but not raised on direct appeal are waived and, thus, are unavailable for post-conviction review), *cert. denied*, 534 U.S. 1164 (2002). To the extent that he is attempting to argue that appellate counsel was ineffective for failing to argue on direct appeal that his lack of adult felony convictions was an overlooked mitigator, he has waived any such argument by failing to raise this specific claim of error in his post-conviction petition. See *Allen v. State*, 749 N.E.2d 1158 (Ind. 2001) (holding that issues not raised in the petition for post-

In addressing this claim, we apply the same standard of review to claims of ineffective assistance of appellate counsel as we apply to claims of ineffective assistance of trial counsel. *Williams v. State*, 724 N.E.2d 1070 (Ind. 2000), *cert. denied*, 531 U.S. 1128 (2001). To prevail on a claim of ineffective assistance of counsel, a petitioner must demonstrate both that his counsel's performance was deficient and that the petitioner was prejudiced by the deficient performance. *Ben-Yisrayl v. State*, 729 N.E.2d 102 (Ind. 2000) (citing *Strickland v. Washington*, 466 U.S. 668 (1984)), *cert. denied*, 534 U.S. 830 (2001). Counsel's performance is deficient if it falls below an objective standard of reasonableness based on prevailing professional norms. *French v. State*, 778 N.E.2d 816 (Ind. 2002). To satisfy the appropriate test for prejudice, the petitioner must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. *Id.* Failure to satisfy either element will cause the claim to fail. *Id.*

Ineffective assistance claims at the appellate level of proceedings generally fall into three basic categories: (1) denial of access to an appeal; (2) waiver of issues; and (3) failure to present issues well. *Bieghler v. State*, 690 N.E.2d 188 (Ind. 1997), *cert. denied*, 525 U.S. 1021 (1998). Young's claim of appellate counsel's ineffectiveness is based on the second category, and we note that our Supreme Court has observed that the reviewing court must be deferential to appellate counsel:

[T]he reviewing court should be particularly sensitive to the need for separating the wheat from the chaff in appellate advocacy, and should not

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conviction relief may not be raised for the first time on post-conviction appeal), *cert. denied*, 535 U.S. 1061 (2002).

find deficient performance when counsel's choice of some issues over others was reasonable in light of the facts of the case and the precedent available to counsel when that choice was made.

*Timberlake v. State*, 753 N.E.2d 591, 605 (Ind. 2001) (quoting *Bieghler v. State*, 690 N.E.2d at 194), *cert. denied*, 537 U.S. 839 (2002). Ineffective assistance is very rarely found in cases where a defendant asserts that appellate counsel failed to raise an issue on direct appeal because the decision of what issues to raise is one of the most important strategic decisions to be made by appellate counsel. *Reed v. State*, 856 N.E.2d 1189 (Ind. 2006).

We employ the following two-part test to evaluate “waiver of issue” claims: (1) whether the unraised issues are significant and obvious from the face of the record; and (2) whether the unraised issues are “clearly stronger” than the raised issues. *Timberlake v. State*, 753 N.E.2d at 605-06. Stated somewhat differently, “[a] defendant may establish that his appellate counsel’s performance was deficient where counsel failed to present a significant and obvious issue for reasons that cannot be explained by any strategic decision.” *Ben-Yisrayl v. State*, 738 N.E.2d at 261. Appellate courts should be particularly deferential to an appellate counsel’s strategic decision to exclude certain issues, unless the decision was “unquestionably unreasonable.” *Bieghler v. State*, 690 N.E.2d at 194. Appellate counsel is not deficient if the decision to present some issues rather than others was reasonable in light of the facts of the case and the precedent available to counsel when the choice was made. *Stevens v. State*, 770 N.E.2d 739 (Ind. 2002), *cert. denied*, 540 U.S. 830 (2003).



We first address Young’s claim that appellate counsel was ineffective for failing to challenge the trial court’s failure to find hardship to dependents as a mitigating factor. When a defendant alleges that the trial court failed to identify or find a mitigating circumstance, the defendant must establish that the mitigating evidence is both significant and clearly supported by the record. *Corbett v. State*, 764 N.E.2d 622 (Ind. 2002). Our Supreme Court has stated, “[m]any persons convicted of serious crimes have one or more children and, absent special circumstances, trial courts are not required to find that imprisonment will result in an undue hardship.” *Dowdell v. State*, 720 N.E.2d 1146, 1154 (Ind. 1999). The Indiana Supreme Court has noted this mitigator may properly be assigned no weight when the defendant fails to show why incarceration for a particular term will cause more hardship than incarceration for a shorter term. *See, e.g., Abel v. State*, 773 N.E.2d 276 (Ind. 2002). Young failed to provide any such evidence. As the post-conviction court found, Young’s appellate counsel’s decision not to raise a sentencing argument regarding hardship to dependents was clearly a strategic decision. Because appellate counsel’s performance was not deficient and Young has failed to show how he was prejudiced by appellate counsel’s failure to raise an argument regarding hardship to dependents, we conclude the post-conviction court did not err in finding that appellate counsel was not ineffective for failing to raise such an argument on direct appeal.

We next address Young’s argument that his appellate counsel was ineffective for failing to argue that his sixty-five-year sentence was manifestly unreasonable. At the time of Young’s direct appeal, our appellate courts could not revise a sentence on appeal

unless it was manifestly unreasonable in light of the nature of the offense and the character of the offender. “This review is very deferential to the trial court: [T]he issue is not whether in our judgment the sentence is unreasonable, but whether it is clearly, plainly, and obviously so.” *Spears v. State*, 735 N.E.2d 1161, 1168 (Ind. 2000) (internal quotes and citations omitted).

As to the nature of the offense, the record reveals that Young engaged in a drive-by shooting on a group of high school kids who were standing in someone’s front yard. Young, who was sitting in the passenger seat, yelled racial and sexual epithets and fired his gun multiple times at the group, striking the victim in the head. Apparently, that was not sufficient for Young because he and the driver of the car turned the car around and drove past the house a second time, during which time Young fired several more shots while leaning out the passenger window and shooting across the hood of the car.

As to Young’s character, we note that Young was twenty-two years old at the time he committed the murder and had a prior criminal history. Young had an adult misdemeanor conviction for possession of marijuana and juvenile adjudications for disorderly conduct as well as carrying a handgun without a license and battery based on an incident where he fired a gun several times at another person and struck him. Additionally, the record reveals that during the time period Young was incarcerated in the Indiana Department of Correction after he was first convicted but prior to his second sentencing hearing, he amassed conduct reports for disorderly conduct; disruptive, unruly conduct; possession or display of an offensive item; and for violation of a law.

We cannot say that Young's maximum sentence was clearly, plainly, and obviously unreasonable in light of the nature of the offense and Young's character. As such, appellate counsel was not ineffective for failing to argue that Young's sentence was manifestly unreasonable.

Judgment affirmed.

MATHIAS, J., concur.

ROBB, J., concurs in result with separate opinion.

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	)	
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**ROBB, Judge, concurring in result with opinion**

I concur in the result reached by the majority, but note that in evaluating Young's character, I would not consider his conduct in DOC after he was first convicted but prior to his second sentencing. I believe we should consider such evidence of character as would have been available to the trial court when imposing sentence. But for the reversal of Young's conviction and his subsequent retrial, his conduct in DOC would not have been before us. Such conduct may be relevant in DOC's consideration of how much credit time to grant Young, but I do not believe it is relevant in our review of his sentence. Because my evaluation of Young's character minus such evidence leads me to the conclusion his sentence is not manifestly unreasonable, however, I concur in the majority's decision that Young's appellate counsel was not ineffective for failing to raise the issue.